

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 Before The Honorable Virginia K. DeMarchi, Magistrate Judge  
4  
5 SVB FINANCIAL GROUP, )  
6 Plaintiff, )  
7 vs. ) No. C 24-01321-BLF  
8 FEDERAL DEPOSIT INSURANCE )  
9 CORPORATION, AS RECEIVER )  
10 FOR SILICON VALLEY BANK, )  
11 et al., )  
Defendants. )

12 San Jose, California  
13 Tuesday, September 17, 2024

14 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
15 RECORDING 10:32 - 11:49 = 1 HOUR, 17 MINUTES

16 APPEARANCES:

17 For Plaintiff:

Sullivan & Cromwell, LLP  
18 1888 Century Park East  
Los Angeles, California 90067  
19 BY: ROBERT A. SACKS, ESQ.  
DIANE L. MCGIMSEY, ESQ.  
20 ADAM S. PARIS, ESQ.

21 For Defendants:

Bailey Glasser, LLP  
22 1055 Thomas Jefferson Street,  
Northwest  
23 Suite 540  
Washington DC 20007  
24 BY: STEPHEN P. SORENSON, ESQ.

25 (APPEARANCES CONTINUED ON NEXT PAGE)

1 For Defendants:

Reed Smith, LLP  
599 Lexington Avenue  
Suite 22  
New York, New York 10022

4 BY: CASEY D. LAFFEY, ESQ.

Reed Smith, LLP  
101 Second Street, Suite 1800  
San Francisco, California  
94105

7 BY: EMILY F. LYNCH, ESQ.

8 Transcribed by:

Echo Reporting, Inc.  
Contracted Court Reporter/  
Transcriber  
echoreporting@yahoo.com

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 Tuesday, September 17, 2024

10:32 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling the next matter, 24CV01321BLF,  
5 SVB Financial Group versus Federal Deposit Insurance  
6 Corporation, as Receiver for Silicon Valley Bank, et al., on  
7 for discovery hearing.

8 If the parties could state their appearances, please,  
9 beginning with Plaintiff's Counsel.

10 MR. SACKS: Good morning, your Honor. Robert  
11 Sacks from Sullivan and Cromwell for the Plaintiff.

12 THE COURT: Okay. Good morning.

13 MS. MCGIMSEY: Good morning, your Honor. Diane  
14 McGimsey from Sullivan and Cromwell for the Plaintiff.

15 THE COURT: Good morning.

16 MR. PARIS: And good morning, your Honor. Adam  
17 Paris from Sullivan and Cromwell, also for the Plaintiff.

18 THE COURT: Okay. Good morning.

19 MR. SORENSON: Good morning, your Honor. Stephen  
20 Sorenson from Bailey Glasser on behalf of the FDIC as  
21 Receiver for Silicon Valley Bank.

22 THE COURT: Good morning.

23 MR. SORENSON: Good morning.

24 MR. LAFFEY: Good morning, your Honor. Casey  
25 Laffey and Emily Lynch from Reed Smith, also on behalf of

1 the FDIC as Receiver for Silicon Valley Bank.

2 THE COURT: Okay. Good morning.

3 This dispute concerns SVBFG's privilege claims  
4 regarding documents that I understand are currently in the  
5 possession of -- well, were in the possession of SBV --  
6 sorry, SVB and are now in the possession of the FDICR1.  
7 Have I got that right?

8 MR. SORENSON: Yes.

9 THE COURT: Okay. Let me know if I confuse things  
10 here.

11 I am frankly struggling with the framework that's  
12 appropriate to resolve this case because both parties seem  
13 to be taking a categorical approach to this dispute. There  
14 may be 24 million documents or maybe only 400,000 documents,  
15 I don't know, but it's not usually the way a privilege  
16 dispute is resolved. Normally, there's fact-specific  
17 inquiries where the party claiming the privilege has to  
18 identify the privilege holder, the nature of the privilege,  
19 assert some sort of -- disclose some minimum amount of  
20 information about the privilege claimed in order for it to  
21 be assessed, and here I'm being asked to make a categorical  
22 decision without even knowing what the documents are or who  
23 the privilege holder may be for a given document. And so  
24 I'm not sure how I'm supposed to do that, unless this is the  
25 rare case where those kinds of categorical decisions can be

1 made.

2 And so I have some questions. And let me start with  
3 the FDIC Receiver, because if these are documents that are  
4 in the FDIC's possession right now, I would like to just  
5 begin with a basic question of what are these documents?

6 MR. SORENSON: These are the documents -- when the  
7 FDIC took over as Receiver, under their mandate, they have  
8 to collect all of the systems of the bank. So they  
9 collected all the e-mail, e-mail custodians, laptops, hard  
10 copy documents -- so they tried to collect all of the -- all  
11 of the bank records.

12 THE COURT: Every document in SVB's possession,  
13 that's what these documents are?

14 MR. SORENSON: They -- the ones we're talking  
15 about here are a subset of those. So --

16 THE COURT: Okay. So what's the subset?

17 MR. SORENSON: The subset is -- it is 24 million  
18 documents, mostly electronic documents, e-mails from  
19 selected custodians. There may be other electronic  
20 documents, but these are, for the most part, the e-mails of  
21 the former Silicon Valley Bank -- Silicon Valley Bank  
22 Financial Group employees. And just for -- I guess for --  
23 just for simplification, I would call it the bank. We call  
24 it the bank and the holding company because it gets  
25 confusing, but --

1 THE COURT: Okay. That's fine. But these are  
2 bank and holding company employees?

3 MR. SORENSON: Just bank --

4 THE COURT: Just bank employees.

5 MR. SORENSON: -- the holding company did not have  
6 employees.

7 THE COURT: Okay. So just bank employees.

8 MR. SORENSON: Only the bank did.

9 THE COURT: Okay. And so they're principally 24  
10 million e-mails?

11 MR. SORENSON: Well, 24 million documents. I  
12 can't say they're all e-mails, but --

13 THE COURT: Okay.

14 MR. SORENSON: -- I think a vast majority are  
15 e-mail communications with attachments and the like.

16 THE COURT: Okay. And do they cover a period of  
17 time, certain subject matter, or is this the entirety of an  
18 e-mail -- for example, e-mail custodian's files?

19 MR. SORENSON: My understanding is it's the entire  
20 e-mail, that they would go to the laptop and take  
21 everything. So however long -- I don't know what the  
22 document retention policy was or what people's practices  
23 was, but I understand it's the entire e-mail box of, for  
24 example, the CEO, the CFO, the General Counsel.

25 THE COURT: Uh-huh. Okay. Now, for purposes of

1 the litigation -- this litigation -- I'm not worried about  
2 any other litigation for the moment. But for this  
3 litigation, it's -- is it fair to say that the parties do  
4 not need all 24 million documents in order to litigate this  
5 case?

6 MR. SORENSON: That's correct.

7 THE COURT: Okay. So is there a subset of  
8 relevant documents about which it might make sense to fight  
9 about privilege, and could we get there? And if so, how can  
10 we get there?

11 MR. SORENSON: I'm afraid, your Honor, I don't  
12 think there is a way to get there. And I think the reason  
13 is because of the way that the holding company structured  
14 the organization. So you had the holding company and the  
15 bank. The bank was wholly owned by the holding company.  
16 And unlike other large banks, which had separate boards of  
17 directors, this bank did not. Everything was commingled.  
18 And so when the bank board and the holding company board  
19 met, they met jointly. They did everything jointly. They  
20 got all of their advice jointly, the minutes were joint, all  
21 the meeting materials were joint. So it's impossible to  
22 untangle what is -- you know, what is a privilege of the  
23 holding company and the bank. So our position is that  
24 anything relating to the bank is subject to a joint  
25 privilege.

1 THE COURT: Uh-huh.

2 MR. SORENSON: Now, the -- my colleagues have  
3 said, "Well, there's a holding company only privilege." We  
4 don't see any basis for that --

5 THE COURT: Okay.

6 MR. SORENSON: -- we actually have never seen an  
7 engagement letter. But to answer your question --

8 THE COURT: Yeah.

9 MR. SORENSON: -- I think there's a way of  
10 excluding certain documents.

11 So our position is that with respect to anything  
12 relating to the bank, its balance sheet and the issues in  
13 this case, which are the governance of the bank, the  
14 investment strategy of the bank, all of that is relevant for  
15 this case. What we know is not going to be relevant for  
16 this case is they had a small number -- the holding company  
17 had a small number of subsidiaries.

18 THE COURT: Uh-huh.

19 MR. SORENSON: The bank represent 98-percent of  
20 the bank -- of the holding company's assets. So two-percent  
21 was in, like, Silicon Valley Bank Venture Group or whatever.  
22 We agree, those are not going to be relevant. So if  
23 there's --

24 THE COURT: And can you distinguish those? Like  
25 -- so here's -- I have this mental picture that's forming



1 of, you know, things in nice little tidy file folders. I'm  
2 sure that's not the case, but, you know, there will be some  
3 things that just aren't privileged because they're just  
4 operational. There are some things that are going to be  
5 totally irrelevant to the litigation because they just don't  
6 matter, either because they relate to subsidiaries that  
7 don't matter or because they're just not relevant to any  
8 issues in dispute. And my hope was -- is that we could just  
9 carve out those things using normal ESI discovery  
10 techniques, whether that's search terms or what have you, so  
11 that we get to a universe of documents that might be  
12 relevant, and then we can figure out what to do about how to  
13 parse out the privilege issues.

14       So that was the question I meant to ask you, is to try  
15 to get to that notion and whether that's a fruitful effort  
16 here. And I -- so I'm not sure if you were answering that  
17 question or a different question?

18       MR. SORENSON: Yes. I don't think it's going to  
19 be a fruitful effort because, I mean, we both have all the  
20 documents now, and so --

21       THE COURT: All of them? Okay.

22       MR. SORENSON: All of them.

23       THE COURT: Okay.

24       MR. SORENSON: We both -- we all have the same  
25 documents.

1 THE COURT: Okay.

2 MR. SORENSON: And, in fact, the documents have  
3 the same identifier. So when they were -- the FDIC turned  
4 them over to the holding company, they have the same  
5 document ID. So we're all working from the same documents  
6 at this point.

7 THE COURT: Okay. Well, that's progress.

8 MR. SORENSON: That's great. It is progress.

9 THE COURT: Okay.

10 MR. SORENSON: And the only question is, you know,  
11 can we access them? And the holding company's position is,  
12 "No, you can't look at" -- their position last year was,  
13 "You can't look at a single document of the CEO until we go  
14 in and review and decide whether there's a holding company  
15 only privilege as to any of those documents."

16 THE COURT: Okay. So is this a custodian specific  
17 problem? In other words, there are certain custodians whose  
18 files are the subject of a dispute about privilege, but  
19 other things, like -- I don't know, the -- you know, just  
20 the operational documents of the bank, how it conducted its  
21 business, are really not a problem.

22 MR. SORENSON: It's not custodian specific  
23 because, initially, the holding company took the position --  
24 they gave us a long list of people -- it was basically every  
25 officer of the bank -- and said, "Do not look at any of

1 their e-mails because we think there might be exclusive  
2 holding company privileged documents. And if you do, we're  
3 going to seek sanctions." So that's what we were dealing  
4 with for the last year.

5 In the meantime, they have reviewed some and released  
6 some documents. But here we are a year later, and we still  
7 have four million documents we, the FDIC -- that we cannot  
8 look at.

9 THE COURT: Okay.

10 MR. SORENSON: I'm sorry, I'm not answering your  
11 question --

12 THE COURT: No, that's okay.

13 MR. SORENSON: -- but I think it's difficult to.

14 THE COURT: You just said the word four million,  
15 which is different than 24 million. So do you -- so is the  
16 -- is this dispute at most, and it's a lot, concerning four  
17 million documents that are associated with particular  
18 custodians?

19 MR. SORENSON: Close. It's a little more than the  
20 four. So what happened was, they went through this process  
21 -- there were 26 million to start, more or less.

22 THE COURT: Okay.

23 MR. SORENSON: And then 22 million have been since  
24 released to the FDIC.

25 THE COURT: Okay.

1 MR. SORENSON: So we have -- you know, we have the  
2 ability to look at 22 million.

3 THE COURT: Oh --

4 MR. SORENSON: They have the ability to look at 26  
5 million. So four million have still not -- they have still  
6 taken the position that, "Don't look at those or you might  
7 be disqualified or we might seek sanctions." So we've got  
8 four million. And then there's another category of things  
9 which they say are privileged, and that, as I understand it,  
10 is four to 500,000 documents.

11 THE COURT: Okay.

12 MR. SORENSON: They have said -- the holding  
13 company has gone through and said, "We believe there's a  
14 holding company only privilege." And they've never produced  
15 a log or anything. They've just told us, "We've been  
16 through it, and we've identified four or 500,000." So we're  
17 talking about maybe 4.5 million documents.

18 THE COURT: And -- okay. So on the -- let's just  
19 start with the -- or pause a moment on the four to 500,000  
20 that are alleged to -- or you understand are holding company  
21 only privilege. There's a claim to that effect. Are those  
22 specific custodians, or do you know which those documents  
23 are?

24 MR. SORENSON: We have no idea, your Honor.

25 THE COURT: Well, you have to be able to know,

1 because you can look at 22 million, but not the others,  
2 right? So you must be able to know which are in the "don't  
3 look" pile, even if you can't actually look at them, right?

4 MR. SORENSON: Well, not exactly, because the way  
5 the -- out of an abundance of caution, the FDIC has a clean  
6 team that can see all the documents.

7 THE COURT: Oh.

8 MR. SORENSON: And what gets over to my team is,  
9 we only see -- we have no -- we don't see any of the other  
10 documents.

11 THE COURT: Okay.

12 MR. SORENSON: We only see documents that have  
13 been released. So we can't -- we don't know -- we don't  
14 know who the custodians are, and we have -- we think they're  
15 probably, you know, the General Counsel and others, but we  
16 don't know because we've never seen a description of the  
17 documents or, you know, whose documents they are.

18 THE COURT: So you can see the custodians and all  
19 the details for the 22 million documents?

20 MR. SORENSON: Correct.

21 THE COURT: And you can probably -- since you know  
22 who the executives were, you can tell who's missing?

23 MR. SORENSON: Correct.

24 THE COURT: Okay.

25 MR. SORENSON: And we have identified -- that's

1 actually a good point. We have identified one missing  
2 custodian, the Deputy General Counsel --

3 THE COURT: Okay.

4 MR. SORENSON: -- for the bank. At least as I  
5 checked this morning, her documents have still not been  
6 released to us.

7 THE COURT: Uh-huh.

8 MR. SORENSON: And she was the Deputy General  
9 Counsel to the bank. She was present at every board meeting  
10 as the secretary. So we believe her -- her e-mails are very  
11 relevant to our case, but we don't have access to those.  
12 But that -- she is the only one that I'm aware of that we've  
13 identified specifically as missing, like, completely. No  
14 documents.

15 THE COURT: Okay. You mentioned also -- okay. So  
16 then there's the four million as to which there's been no  
17 position taken, but are still being -- the position taken is  
18 that you can't look at them yet, right? So four million are  
19 still under review, to your understanding, on behalf of the  
20 FDIC?

21 MR. SORENSON: Yes.

22 THE COURT: Okay. So -- okay. Being reviewed by  
23 the holding company. All right.

24 You mentioned a clean team. I do have some experience  
25 in the criminal law context of, you know, the team approach

1 the U.S. attorney's office sometimes takes. This is by  
2 agreement of the parties, there's a clean team?

3 MR. SORENSON: There was, back -- this was set up  
4 last year and -- when the holding company asserted this  
5 privilege, the FDIC, I mean, at the time was just starting  
6 its investigation. And so they basically said, "You can't  
7 look at any documents." And so the FDIC said, "Well, we're  
8 not waive -- we don't believe these are privileged. We  
9 reserve our rights. But we'll agree to go through this  
10 process." And under -- they had the impression, the FDIC,  
11 that this was going to be a fast process and that documents  
12 would come out quickly. Here we are a year later, we're  
13 still, you know, four million documents to go.

14 And so each side had a clean team. So the holding  
15 company clean team would look at them and release them, and  
16 the FDIC clean team -- I actually don't -- I'm not even sure  
17 -- I have no contact with them, so I'm not sure what they  
18 do.

19 THE COURT: But what's the process supposed to be?  
20 Does -- because I could imagine if those parties have clean  
21 teams, then each clean team can say, "We think these are not  
22 privileged. Can we" -- on the FDIC side.

23 MR. SORENSON: Yes.

24 THE COURT: "We think these are not privileged.  
25 Can we disclose them to, like, the litigating team?" Is

1 that what's going on?

2 MR. SORENSON: Well, it has hasn't gone on that  
3 way yet, your Honor, because -- given the threats of  
4 disqualification, I was even concerned about having  
5 conversations with the clean team or even learning, you  
6 know, what --

7 THE COURT: No, no. They would not have that  
8 conversation with you. They would have that conversation  
9 with the clean team on the --

10 MR. SORENSON: Oh.

11 THE COURT: -- holding company side. So I'm not  
12 sure what --

13 MR. SORENSON: Yeah, those have been ongoing, I  
14 believe.

15 THE COURT: Okay. Well, I'm going to ask the  
16 holding company folks what they think the process is. But  
17 one of the thoughts I had is, is there a way for some subset  
18 of clean teams to communicate with each other about things  
19 that could be released versus not released, to crystallize  
20 what the disputes are? And I was really excited to hear  
21 that those structures existed, but maybe they're not being  
22 used in that way. So maybe we can explore that further.  
23 Okay.

24 MR. SORENSON: Your Honor, could I just make one  
25 point about the clean team?



1 THE COURT: Please go ahead.

2 MR. SORENSON: The clean team process has been  
3 going on for a long time, and we have a schedule in this  
4 case where we're supposed to finish document discovery by  
5 the end of January and fact discovery by early April. And  
6 given the process of clean team, we're never going to be  
7 able to meet that if we don't deal with the privilege issue.

8 THE COURT: Yeah. But I can't deal with the  
9 privilege issue in a vacuum, either. And right now, I have  
10 a vacuum. Honestly, I just -- I don't -- I mean, maybe  
11 we'll get -- maybe there's not a vacuum. Maybe there are  
12 categories, but I need to -- I have a few more questions, so  
13 -- and I'll ask these -- I'll give the holding company an  
14 opportunity to respond as well.

15 But the way that this dispute is presented is that the  
16 FDIC has the documents, and then there was effectively a  
17 clawback. What is the authority that you understand the  
18 holding company is relying on for the clawback? Is it just  
19 502(b)? Is it an agreement? Is it -- I didn't look at the  
20 protective order. If we have one, I probably signed it.  
21 But is there a 502(d) order? What is the nature of the  
22 clawback authority?

23 MR. SORENSON: I believe it was -- I mean, the man  
24 came in the context of bankruptcy, and I think the holding  
25 company's position was that that was some -- that was --

1 they had property rights to that as -- you know, as the  
2 estate for the holding company.

3 THE COURT: I mean, the -- this is another thing  
4 that was a little bit mysterious in the papers, which is,  
5 privilege is not -- I mean, there's, like, who has ownership  
6 of the documents, which is, I guess, a concept. But  
7 privilege is separate. Privilege is not about ownership.  
8 It's about a particular relationship and whether the  
9 communication is within the scope of that relationship and  
10 not waived. So I wasn't really -- and maybe this is a  
11 question for the holding company -- wasn't really helpful to  
12 me to talk about this in terms of who owns the documents.

13 Confidentiality is necessary, but not sufficient, for  
14 privilege. So also, that discussion was -- seemed a little  
15 bit off. If there is a privilege claim, it has to meet  
16 certain requirements. And if it doesn't, there's no  
17 privilege. So I'm not entirely sure -- again, the framing  
18 of the dispute before me is a little puzzling.

19 So the clawback was initiated in the bankruptcy court,  
20 not as part of the discovery process in this proceeding?

21 MR. SORENSON: Correct.

22 THE COURT: Okay. Has the bankruptcy court made  
23 any determinations about that issue?

24 MR. SORENSON: The -- I don't think any of that  
25 bear on what we're talking about here.

1 THE COURT: Yeah. Is there an order? Is there a  
2 protective order that says how the clawback is supposed to  
3 be managed? Do they have the Federal Rules of Evidence 502  
4 in bankruptcy?

5 MR. SORENSON: Yeah.

6 THE COURT: I'm revealing my ignorance about what  
7 happens in bankruptcy court.

8 MR. SORENSON: Yeah. Okay. Let me just confirm  
9 with my counsel. He was closer to it --

10 THE COURT: Sure. Please feel free.

11 MR. SORENSON: -- because I was not part of the  
12 bankruptcy.

13 THE COURT: Yeah.

14 MR. SORENSON: I don't know, but it was not raised  
15 as part of the bankruptcy. I think -- and my understanding  
16 was there were discussions over time after -- holding  
17 company declared bankruptcy soon after the receivership.

18 THE COURT: Okay.

19 MR. SORENSON: And then there were discussions,  
20 and, eventually, the FDIC turned over the 26 million  
21 documents to the holding company.

22 THE COURT: Okay.

23 MR. SORENSON: But --

24 THE COURT: So let me just ask a really high-level  
25 question, which is, how would the FDIC -- if I'm to treat

1 this in a categorical way -- you've already alluded to joint  
2 privilege. What is the question I need to resolve, framed  
3 in a categorical way? Like, how would you pose that  
4 question?

5 MR. SORENSON: Sure. I would say -- I mean, the  
6 question is -- your Honor, it's really a question of who was  
7 the client here? And in this case, we believe that the  
8 facts -- the undisputed facts even show that they operated  
9 as one client, that is the holding company and the bank  
10 never differentiated. So whenever they had meetings, the  
11 General Counsel, who, you know, is a lawyer for the bank and  
12 the holding company, he came and would give advice to both  
13 of them. He didn't come in and say, "Okay. We're going to  
14 have a separate meeting for the holding company, a separate  
15 meeting for the bank." They never did that. He just came  
16 in and gave advice. And it was the same legal department.  
17 The holding company did not have a legal department. All  
18 the officers were the same. So, in effect, they were alter  
19 egos of each other. They just ignored those corporate  
20 forms. And in that context, it really becomes a single  
21 client.

22 THE COURT: So -- okay. So we have the client,  
23 and you say it's a single client or, I think if I read your  
24 papers correctly, joint client?

25 MR. SORENSON: Joint, yes.

1 THE COURT: Who's the lawyer? The legal  
2 department -- the in-house shared legal department or some  
3 other lawyer?

4 MR. SORENSON: Both the in-house legal department  
5 as well as outside counsel. For example, Sullivan and  
6 Cromwell was outside counsel.

7 THE COURT: So this is where I feel like the  
8 categorical approach starts breaking down, because if it's  
9 the case that, as to all four million documents or all 400  
10 to 500,000 documents, this is true, I'm not sure if that's  
11 undisputed, right? So how do I determine whether that's  
12 undisputed or not? If it extends beyond the in-house legal  
13 department to outside counsel, outside counsel for what  
14 purpose or purposes? You know, those are the questions that  
15 usually need to be addressed and can't be resolved  
16 categorically. But you think that is possible to resolve  
17 here?

18 MR. SORENSON: I do. And not just because of the  
19 joint client, but the question -- and this is really a  
20 question of law for your Honor -- is, was there an  
21 attorney/client relationship between the bank and its  
22 in-house lawyers and certain outside lawyers like Sullivan  
23 and Cromwell? And what we've heard from the holding company  
24 is they say, "Ah, no, no, no, we only represented the  
25 holding company. We did not represent the bank. Even

1 though we came to board meetings of the bank, we did not  
2 represent the bank."

3 Now, what Sullivan and Cromwell or what even the  
4 lawyers' thought doesn't really matter. What matters is  
5 what the people receiving the legal advice believed. And so  
6 a director in this case, who was a director of both the bank  
7 and the holding company, came to a meeting of both -- it was  
8 a joint meeting. It was clear in the minutes, this is a  
9 joint meeting -- and got legal advice from attorneys,  
10 in-house counsel, outside counsel.

11 THE COURT: Uh-huh.

12 MR. SORENSON: What would he reasonably think or  
13 he or she reasonably think? That they had a lawyer there as  
14 a bank board member, because no one came in -- you'll see --  
15 I mean, you won't see, but the board minutes don't say -- at  
16 the beginning, you know, the lawyers don't say, "Hey, we're  
17 here only for the holding company. We're not giving you  
18 advice." They don't say that anywhere. So in that  
19 circumstance, if a reasonable person in that director or  
20 officer position of the bank thought that they were getting  
21 legal advice, either from in-house counsel, outside counsel  
22 like Sullivan and Cromwell, an attorney/client relationship  
23 is created. And that's the sort of related --

24 THE COURT: Yeah.

25 MR. SORENSON: -- issue to the joint client. It's

1 just two ways to get to the same place.

2 THE COURT: Usually, I have a factual record for  
3 those determinations. I have somebody's declaration or  
4 something. And it's usually either advice specific, like  
5 legal advice as to the subject matter, "I felt I was client  
6 of whoever," or document specific. So this is why I am a  
7 little bit troubled by this.

8 Let me ask another sort of foundational question. And  
9 I'm sorry that you all have to be patient, but I'll have the  
10 same questions for you on the holding company side, but what  
11 law applies? State law? Federal law? I dug around in the  
12 case law a little bit and they're -- like, to my surprise,  
13 it sounds like state law applies here, in which case nobody  
14 has briefed California law really on this requirement or  
15 this idea of -- and I'll just -- maybe jumping ahead, but,  
16 you know, if it's California law and we have Evidence Code  
17 -- California Evidence Code 950 and 954 defining a  
18 confidential communication, there's this concept of, you can  
19 be, you know, the client, and then you can have someone else  
20 there who is there -- who is present to further the interest  
21 of the client in the consultation, in which case there is no  
22 disruption of the privilege.

23 Nobody has really briefed the nuances of that in this  
24 circumstance, and I wonder if that needs to happen for me to  
25 resolve this dispute, depending -- you know, if it's board

1 meetings or e-mail communications or what have -- whatever  
2 the circumstances are -- and we're talking about California  
3 law. California has some nuances that are different from,  
4 you know, federal common law. So you agree it's --  
5 California law applies here?

6 MR. SORENSON: Yes, I believe it does.

7 THE COURT: Okay.

8 MR. SORENSON: I don't believe that issue --  
9 briefing would be helpful because it's -- it covers every --  
10 for example, every single board meeting was a joint board  
11 meeting, and every single meeting, the officers and  
12 directors were identical -- came to the meeting to discuss  
13 both holding company and bank issues, had counsel present,  
14 got advice -- it's all mixed up.

15 Now, we have specific topics in this case, in  
16 particular corporate governance --

17 THE COURT: Uh-huh.

18 MR. SORENSON: -- that we believe -- and if we  
19 have the opportunity to present some evidence --

20 THE COURT: Uh-huh.

21 MR. SORENSON: -- that show that these directors  
22 of the bank were getting advice from lawyers, in-house  
23 lawyers, outside lawyers, in their capacity as bank  
24 directors and that we're entitled to any advice relating to  
25 that, which, up to now, we have not --



1 THE COURT: But will that take care of everything,  
2 though? So it could be -- because, you know, there's the  
3 four million, and then there's the 400 to 500,000, and  
4 you've told me there's e-mails of custodians, which is sort  
5 of a bigger set -- you know, set of materials than board  
6 meeting minutes or e-mails about board meeting minutes.

7 So do you just -- are you just really interested in the  
8 board meeting minutes? Are those being withheld? What --

9 MR. SORENSON: Those have not been withheld.

10 THE COURT: Oh, okay.

11 MR. SORENSON: And that's -- the only reason we  
12 know anything about legal advice is because we've seen board  
13 minutes that reference legal advice. For example, we know  
14 that Sullivan and Cromwell each year would come in and  
15 evaluate the bank board and give them advice about how they  
16 should govern themselves. That's going to be an issue in  
17 this case. And that's just a very concrete thing that we  
18 believe we're entitled to know what outside lawyers were  
19 telling the bank about whether its directors were satisfying  
20 their fiduciary duties. That's going to be an issue in our  
21 case. And right now, the holding company's perspective is,  
22 "No, you don't get to see that advice because we believe the  
23 privilege belongs only to the holding company."

24 THE COURT: Well, that is a dispute -- that is a  
25 more discreet dispute that I could resolve, I suspect. So

1 if it's -- okay. That -- this is an example of a kind of  
2 dispute where the issues could be joined, if it's, you know,  
3 that kind of specific thing. I'm not sure I can do that on  
4 the record that I have right now. But let me just kind of  
5 follow this argument about, you know, what the role of the  
6 FDIC as Receiver is right now and what rights it has,  
7 because one of the things that is cited to me is the statute  
8 1821(d)(2)(A), the successor provision, does privileges mean  
9 or include attorney/client privilege when it says that the  
10 Receiver succeeds to all rights, titles, powers, and  
11 privileges of the insured depository institution? So if  
12 there is a joint privilege, FDIC is now the holder of that  
13 joint privilege?

14 MR. SORENSON: I would say that is correct. If  
15 there's a joint privilege, we stand in the shoes of the bank  
16 for all purposes. I don't think --

17 THE COURT: And that's not disputed.

18 MR. SORENSON: Well, I don't know.

19 THE COURT: Or is it?

20 MR. SORENSON: I don't know if it's disputed that  
21 -- when -- we do stand in the shoes of the bank.

22 MR. SACKS: It's not, your Honor.

23 THE COURT: It's not disputed?

24 MR. SACKS: No.

25 THE COURT: Okay. All right. So then maybe what

1 I'm understanding is there is a category of stuff for which  
2 there is asserted to be no joint privilege but an exclusive  
3 privilege by the holding company. Is that fair to say,  
4 holding company folks?

5 MR. SACKS: Correct.

6 THE COURT: Okay. All right.

7 How do I figure out which -- how do I test that  
8 assertion? I'm going to ask both sides this question, but  
9 if there's a -- this group of four to 500,000 documents that  
10 are claimed to be the exclusive privilege of the holding  
11 company, not ever a joint privilege, I assume their argument  
12 would be then, well, you disclose them to a third party then  
13 outside the scope of the attorney/client privilege, and  
14 there's a waiver. That's your part two argument.

15 MR. SORENSON: Correct.

16 THE COURT: Okay. So how would I -- what is an  
17 efficient way for me to actually test that in a concrete  
18 way? Would I need to see an example of the documents, in-  
19 camera perhaps, if these are among things you haven't been  
20 permitted to access except via your clean team. What would  
21 be an efficient way to resolve that? And you can confer.  
22 Please take your time.

23 MR. SORENSON: I guess one thing that we had  
24 proposed to the holding company, which they rejected, was  
25 the idea of a clawback, that -- we have the documents, they

1 have the documents, and that we both be able to look at  
2 them, preserving all claims of privilege and the right to  
3 claw documents back. So that would be one thing we propose  
4 as a way through this.

5 THE COURT: So --

6 MR. SORENSON: And if there's dispute about that,  
7 we can come back to your Honor.

8 THE COURT: Well, that was kind of where I was  
9 going with the clean team issue, and you said, "Well, that's  
10 going to take too long," so maybe we don't prioritize --

11 Anyway, I'm going to ask the holding company folks some  
12 questions, but I do want to give you an opportunity to just  
13 -- if I've missed something or overlooked something you  
14 think is sort of essential here, please let me know. I'll  
15 give you that chance before I go to the holding company.

16 MR. SORENSON: I guess, as my colleague notes,  
17 that, you know, the clean team is not really involved in  
18 this matter, and in order to move this case forward, like,  
19 we really -- we, the team litigating this case, really needs  
20 access to those documents. And it's just having the clean  
21 team in the middle of it, and a clean team that's really not  
22 knowledgeable about, you know, what the issues are in this  
23 case, we -- I don't see that being a way to work through  
24 this in a timely fashion so that we can meet the Court's  
25 schedule.

1 THE COURT: Why couldn't the clean team be  
2 educated about what the issues are in this case, and then  
3 have a process where the dispute happens -- where you're  
4 insulated until it's resolved? That's what I had in mind is  
5 that the clean team on your side identifies documents that  
6 are relevant and responsive to your needs in the case,  
7 innate of your setoff and whatever the -- else the issues  
8 are, corporate governance, investment strategy, those  
9 things, says to its counterpart, the clean team over at the  
10 holding company, "We think these need to be disclosed." If  
11 there's a dispute about that, I need a privilege log or I  
12 need some other indication of what the basis for the  
13 privilege is, and then I resolve it. But you're insulated -  
14 - the litigation team is insulated, but the clean team is  
15 kind of -- try to crystallize the dispute. Is that not -- I  
16 mean, I know you -- everybody thinks that this needs to have  
17 happened yesterday, but here we are, right? Is that not a  
18 possible approach?

19 MR. SORENSON: It's certainly a possible approach.  
20 It's just -- it has not worked that well so far because  
21 we're --

22 THE COURT: Okay.

23 MR. SORENSON: -- you know, it's really been a  
24 very, very slow process. I mean, it's -- we -- it's taken  
25 over a year to get documents released. So I just -- I don't

1 think it's a way to get -- you know, for us to get through  
2 discovery in this case in a timely way.

3 THE COURT: Okay. So your proposed solution is  
4 just make them turn everything over?

5 MR. SORENSON: We're asking that we have the right  
6 to review it. I mean, we would say subject to a --

7 THE COURT: The litigation team has a right to  
8 review it.

9 MR. SORENSON: Has to review it subject to, you  
10 know, clawback rights and, right, for anyone, either side.  
11 Like, their view is that we might have an exclusive  
12 privilege to some things, but that neither party is waiving  
13 the right to claim privilege and have something excluded in  
14 this litigation.

15 THE COURT: Okay. Okay. Thank you.

16 Let me turn now to SVBFG. I'm going to call you the  
17 holding company because that makes more sense.

18 First of all, why does the holding company believe that  
19 the bankruptcy court should resolve this dispute?

20 MR. SACKS: So, your Honor, can I just before I  
21 answer that question --

22 THE COURT: Uh-huh.

23 MR. SACKS: -- give you -- Mr. Sorenson is a  
24 newcomer to this. We've been dealing with it for 18 months,  
25 and there's some things that are incorrect --

1 THE COURT: That's fine.

2 MR. SACKS: -- just as a factual matter. And  
3 maybe I can correct them, and then I'll answer your  
4 question.

5 THE COURT: Well, if you want to do it that way,  
6 sure.

7 MR. SACKS: I'll do it however -- whatever you  
8 prefer.

9 THE COURT: Your first point in the summary of  
10 dispute --

11 MR. SACKS: Okay.

12 THE COURT: -- was the bankruptcy court should be  
13 handling this issue.

14 MR. SACKS: Okay. Okay. I'll answer that -- I'll  
15 answer that question. The question here involves the  
16 privileges and property of the bankruptcy estate. This  
17 issue could have been resolved. It's a dispute over whether  
18 these documents are privilege to the bankruptcy estate and  
19 whether they belong to the bankruptcy estate. Two different  
20 issues, as your Honor -- but related to one another in part.  
21 They could have been resolved on motion by the bankruptcy  
22 court in March of 2023, in April of 2023, or any time since.  
23 The FDIC has studiously avoided the bankruptcy court and not  
24 wanted to go there.

25 This action wasn't brought until March of this year.

1 The issues they're raising don't relate specifically to this  
2 dispute. Indeed, there are no discovery requests to which  
3 these documents specifically relate. But why are they the  
4 bankruptcy court? Because they involve the property of the  
5 estate, which is a bankruptcy matter, and it's specifically  
6 with the -- in the ambit of the bankruptcy court's  
7 jurisdiction, and it's also subject to the bankruptcy  
8 court's confirmation order expressly retaining jurisdiction  
9 over property of the estate and privileges of the estate.  
10 So that's why it goes to the bankruptcy court. The question  
11 is not specific to this litigation, but a generalized  
12 position that the FDIC has that all of the documents that  
13 were on the server of the bank when the bank failed, which  
14 was a subsidiary, but they were there pursuant to  
15 intercompany agreements, belong to them, not to us, and are  
16 not privileged. That's why it goes to the bankruptcy court.

17 THE COURT: I don't understand the argument that's  
18 in the briefing, at least, and -- or your argument right now  
19 that the bankruptcy court has exclusive jurisdiction and  
20 that I can't resolve this as a discovery dispute as Judge  
21 Freeman I think expects me to do.

22 MR. SACKS: You may resolve a discovery dispute as  
23 it relates specifically to this case, but there is -- this  
24 is not a discovery dispute that relates to this case. This  
25 is a generalized dispute, which is, are all of the documents



1 -- 24 million documents --

2 THE COURT: Uh-huh.

3 MR. SACKS: -- the property -- an unprivileged  
4 property of the bank as opposed to the holding company?  
5 They're not. Are these documents that are responsive to  
6 request number six that asked for documents relating to X,  
7 Y, and Z, properly privileged or not?

8 THE COURT: Uh-huh.

9 MR. SACKS: And that's what should be resolved.  
10 This is not a Rule 37 motion. They don't cite any authority  
11 for your Honor to look at these issues. This is not -- we  
12 haven't withheld anything pursuant to a discovery request in  
13 this case.

14 THE COURT: That's because all of the documents  
15 are in their possession right now.

16 MR. SACKS: No, your Honor. No. Again --

17 THE COURT: That's what I understood.

18 MR. SACKS: Let me --

19 THE COURT: So maybe that's one of the things that  
20 you would like to correct.

21 MR. SACKS: Let me go to the facts now. So it's  
22 not correct that the dispute involves 24 million documents.  
23 There were 24 million documents. They have access to  
24 23,700,000 of those documents, approximately.

25 THE COURT: Okay.

1 MR. SACKS: There are only 300,000 documents that  
2 remain in dispute. We haven't --

3 THE COURT: Wait, I'm sorry, 300,000 documents  
4 that remain in dispute or that haven't been reviewed yet and  
5 are potentially in dispute?

6 MR. SACKS: The latter. The latter.

7 THE COURT: Haven't been reviewed yet?

8 MR. SACKS: They're in the process of review,  
9 three hundred --

10 THE COURT: Oh, so not four million. It's 300-  
11 something thousand?

12 MR. SACKS: Three hundred thousand documents that  
13 we have possession of that are e-mail electronic  
14 documents --

15 THE COURT: Okay.

16 MR. SACKS: -- that we are reviewing. They know  
17 the custodians. There are 45-ish custodians. We've  
18 identified them for them --

19 THE COURT: Okay.

20 MR. SACKS: -- who those documents relate to.  
21 They relate to internal lawyers who provided services to the  
22 holding company and to the bank, some of them, and to other  
23 subsidiaries of the --

24 THE COURT: Uh-huh.

25 MR. SACKS: -- holding company, such as the

1 securities firm and --

2 THE COURT: The other subsidiaries. Okay.

3 MR. SACKS: -- the other subsidiaries, not the  
4 bank.

5 THE COURT: Okay.

6 MR. SACKS: Okay. Now, the way to deal with those  
7 -- which we are reviewing them, and we are basically saying  
8 here that we have no claim of privilege over these, these,  
9 these, as we get through them. We have not asserted a claim  
10 of privilege specifically as to any specific document at  
11 this point. So we're talking about 300,000 and reducing as  
12 we are now.

13 THE COURT: Can I just pause you there to make  
14 sure I have a --

15 MR. SACKS: Yes.

16 THE COURT: -- so these are 300,000 that are still  
17 under review. But is there a separate collection of four to  
18 500,000 where the holding company has said you can -- we've  
19 reviewed and you can't see these?

20 MR. SACKS: No. No, your Honor.

21 THE COURT: Well, that's really interesting,  
22 because that is --

23 MR. SACKS: There are none.

24 THE COURT: -- very different.

25 MR. SACKS: Now, the only ones that remain are the

1 ones that we are in the process of reviewing to  
2 de-designate, if you will, and give them to them. So of the  
3 24 million, they've got all except 300,000 today.

4 THE COURT: And no privilege claim has been made?

5 MR. SACKS: That's correct. We are -- well, no.  
6 We've said that these may have privilege, but no specific  
7 claim on any specific documents.

8 THE COURT: "May" meaning the 300,000 still under  
9 review?

10 MR. SACKS: Under review. As to the remainder, no  
11 privilege claim as to the -- I'm giving you rough numbers.

12 THE COURT: Yeah, I understand.

13 MR. SACKS: As to the 23 plus million, no claim of  
14 privileges to any of those documents. They have them all --

15 THE COURT: Okay. And so as to --

16 MR. SACKS: -- and are free to review them all.

17 THE COURT: As to the three -- and there's no --  
18 you've made that clear, there's been a communication between  
19 Counsel about which ones are available to review and which  
20 aren't?

21 MR. SACKS: Yes, your Honor.

22 THE COURT: Okay.

23 MR. SACKS: And these -- my two colleagues here  
24 are directly involved in that process, if you want --

25 THE COURT: Well, before you all leave today --

1 MR. SACKS: Uh-huh.

2 THE COURT: -- I'm going to make you talk to each  
3 other about that particular issue to make sure there is no  
4 disagreement. We're all here. This side can tell this side  
5 exactly which documents are available to be reviewed and  
6 which aren't, okay? So that there's no ambiguity when  
7 you're still here in the building. There's no reason for  
8 anybody to have any -- okay. So now let's talk about the --

9 MR. SACKS: We have not been dealing with Mr.  
10 Sorenson and his firm. We've been dealing with Mr. Laffey  
11 and his firm.

12 THE COURT: Well, you can talk to Mr. Laffey then.

13 MR. SACKS: I don't think Mr. Laffey -- well, I'll  
14 let him speak --

15 THE COURT: You can talk --

16 MR. SACKS: -- but I don't think --

17 THE COURT: I'm going to order you to talk to each  
18 other before you leave the building to this point --

19 MR. SACKS: So --

20 THE COURT: -- so there is no ambiguity. Okay.

21 MR. SACKS: So, your Honor asked --

22 THE COURT: Wait just a minute.

23 MR. SACKS: Your Honor asked for how to deal with  
24 -- what's an efficient way to deal with it --

25 THE COURT: Yeah.

1 MR. SACKS: -- as it relates to this case. I  
2 would offer you several alternatives for how --

3 THE COURT: Okay.

4 MR. SACKS: -- to deal with it as it relates to  
5 this case.

6 First, in the context of specific discovery requests,  
7 if we withhold any of those documents from them, they'll be  
8 identified specifically and you can make a determination of  
9 privilege in the ordinary course the way people normally do  
10 under Rule 37.

11 Second, we have told them that if they give us search  
12 terms, we will run those search terms over those remaining  
13 documents right away and promptly look at the ones that hit  
14 on those terms and tell them if any of those -- give -- tell  
15 them if any of those are documents over which we believe we  
16 have a claim of holding company privilege. They've not  
17 taken us up on that. It remains an offer if they want to do  
18 it. The last time, for other documents we ran search terms  
19 on, I believe we got them an answer and the documents in  
20 three days?

21 MS. MCGIMSEY: Two days.

22 MR. SACKS: Two days. So if they want to do that,  
23 we've offered that to them, not -- and that will cut down  
24 again, because, presumably, they have search terms that they  
25 think would be relevant to this case.

1 THE COURT: Uh-huh.

2 MR. SACKS: And we will do that as a priority item  
3 rather than just going through methodically the 300,000  
4 documents.

5 THE COURT: And before you get onto your next  
6 suggestion, on the search term issue, is that contingent on  
7 there being a document -- so here -- my understanding is,  
8 the FDIC folks say, "Why would we serve document requests  
9 when these are documents that we believe we should control  
10 in the first instance?" So my question, without resolving  
11 that issue, is your proposal about using search terms to  
12 sort of figure out what's relevant to the case contingent on  
13 the service of document requests by the FDIC Receivers to  
14 the holding company?

15 MR. SACKS: I think they have to be relevant to  
16 this case -- search terms that are relevant to document  
17 requests for claims in this case. And, your Honor, I should  
18 go one more step back.

19 THE COURT: Okay.

20 MR. SACKS: None of these documents are relevant  
21 to the claims we've asserted in this case.

22 THE COURT: No, I understand.

23 MR. SACKS: Our case doesn't depend on any of this  
24 stuff. They have not asserted any counter claims.

25 THE COURT: Because they haven't answered yet.

1 MR. SACKS: They have not. And we have asked them  
2 to please identify for us what the counterclaims are. If  
3 you looked at the record, I don't know if you did, Judge  
4 Freeman --

5 THE COURT: I looked at part of it, yeah.

6 MR. SACKS: -- okay -- she struck their statement  
7 of claims.

8 THE COURT: Right.

9 MR. SACKS: We have, in discovery request, asked  
10 them to identify the counterclaims they intend to bring so  
11 we can define the relevance of discovery here. And they've  
12 said, "It's premature, and we're not going to do it." So at  
13 the -- they served those yesterday. In response to an  
14 interrogatory, they served us an objection and said, "It's  
15 premature, and we're not going to do it. Now, we'll tell  
16 you when we serve our answer." Well, they can't really have  
17 it both ways. If you want to determine what's relevant  
18 discovery to this case, tell us what your counter -- what  
19 your setoff claims are going to be so we can assess whether  
20 that's a proper request.

21 THE COURT: I mean, I understand your point, and  
22 I'm really very interested in if we can sort of cabin the  
23 work that everybody needs to do by focusing on what's  
24 relevant to the case. But given the procedural posture  
25 where your motion to dismiss isn't being heard until



1 October, sometime mid-October, and then it will be resolved,  
2 and then there'll be, potentially, an answer and affirmative  
3 defenses pled or counterclaims pled -- I mean, Judge Freeman  
4 is not waiting for all of that to happen in terms of  
5 discovery.

6 MR. SACKS: I understand.

7 THE COURT: So what I'm wondering is, you know, in  
8 terms of -- there seems to be a dispute about whether, as  
9 the successor to SVB, these documents -- and I'm just going  
10 to focus on the 300,000 that have been not allowed to be  
11 looked at -- whether these documents are, in fact, in their  
12 possession, custody, and control as an -- as a matter of  
13 operation of that statute. And it sounded like you had a  
14 different view of that.

15 MR. SACKS: No, I do and I don't.

16 THE COURT: Uh-huh.

17 MR. SACKS: So they possess -- they have them  
18 physically -- and by the way, they've breached a contract by  
19 not returning documents to us. But the determination of  
20 whether they have a right to review them is a fact-specific  
21 determination.

22 THE COURT: Uh-huh.

23 MR. SACKS: The question of, when advice was given  
24 or communications had, were those holding company  
25 communications or were those bank communications? There

1 were intercompany agreements pursuant to which the same  
2 server was used, but there were requirements that bank  
3 personnel review documents solely for purposes of performing  
4 services that they were engaged to perform for the holding  
5 company and maintain confidentiality of it.

6       So the fact that documents that belonged to the holding  
7 company were on bank servers pursuant to intercompany  
8 agreements is not something that your Honor can determine in  
9 a vacuum. You need the factual context --

10           THE COURT: Uh-huh.

11           MR. SACKS: -- and understanding of all of that.  
12 So I think we're running far afield. As well, they should  
13 be determined in the context of documents that are relevant  
14 to the issues in this case, not documents in the abstract.  
15 If they want to bring a claim, they can bring it in  
16 bankruptcy court. They could presumably file a lawsuit to,  
17 say, seek a declaratory judgment, "These are my documents,  
18 not your documents, and there is no privilege applicable to  
19 them." They haven't done any of that.

20           THE COURT: Yeah. Okay.

21           MR. SACKS: But what's not relevant is to ask for  
22 all of the company's documents on any subject relating to  
23 not just the bank, but anything else, and ask for a  
24 categorical determination in this court relating to a  
25 dispute that has four corners to it and is specifically

1 defined.

2 THE COURT: So do you agree that state law applies  
3 to the question of privilege?

4 MR. SACKS: I believe that the California law is  
5 applicable to the question of privilege --

6 THE COURT: Uh-huh.

7 MR. SACKS: -- in most -- in probably most  
8 instances. It's possible there could be some documents in  
9 there that reflect privilege given in another state by a  
10 lawyer admitted in another state to a subsidiary that's  
11 located in another state, but I think, by and large, we're  
12 dealing with California law.

13 THE COURT: So for these 300,000 documents that  
14 are potentially privileged and are still under review --

15 MR. SACKS: Yes.

16 THE COURT: -- what is the thesis about why the  
17 privilege might apply, if it does?

18 MR. SACKS: Oh, because, for example, the General  
19 Counsel. General Counsel served as General Counsel of the  
20 holding company and also General Counsel of the bank and  
21 General Counsel of other subsidiaries. There were matters  
22 that related to, for example, securities disclosures.

23 THE COURT: Uh-huh.

24 MR. SACKS: The holding -- that's a matter for the  
25 holding company. It had public shareholders.

1 THE COURT: Uh-huh.

2 MR. SACKS: It made public filings. If the  
3 General Counsel of the bank advised on securities  
4 disclosures, that's a matter within the scope of the -- a  
5 privilege of the holding company, not a bank privilege,  
6 okay?

7 THE COURT: Okay.

8 MR. SACKS: That's a -- that's an example --

9 THE COURT: Yes.

10 MR. SACKS: -- of a matter that would be there.  
11 It depends upon what the specific matter is on which advice  
12 was given.

13 THE COURT: Okay. Okay.

14 MR. SACKS: There are many things that are joint,  
15 your Honor.

16 THE COURT: All right. Let me just pause you  
17 there. Let's just take that example.

18 MR. SACKS: Yes.

19 THE COURT: So the advice was given on the  
20 securities matter --

21 MR. SACKS: Uh-huh.

22 THE COURT: -- but it was given to people who were  
23 not exclusive to the holding company. It was given to the  
24 bank.

25 MR. SACKS: Correct.

1 THE COURT: The bank had access. Okay. So just  
2 maybe --

3 MR. SACKS: I'll bear with you for a minute, yes.

4 THE COURT: -- and maybe you want to quibble with  
5 that, right? But privilege log is not like work product.  
6 Unless you establish the provision applies in California  
7 Evidence Code 954, that that SVB participant was there to  
8 further the interest of the holding company, there's  
9 disclosure outside the scope of the privilege, right?

10 MR. SACKS: No, your Honor.

11 THE COURT: And that could be the thesis that I  
12 would be asked to test.

13 MR. SACKS: It could be a thesis you're asked to  
14 test, but we have a different view of it.

15 THE COURT: Uh-huh.

16 MR. SACKS: So the -- let's assume it's given to  
17 the CEO.

18 THE COURT: Okay.

19 MR. SACKS: The CEO acts as the CEO of the holding  
20 company and the CEO of the bank. When he's getting  
21 information about the company's security disclosures, he's  
22 acting as CEO of the holding company.

23 THE COURT: Uh-huh.

24 MR. SACKS: People wear different hats, and courts  
25 recognize -- the Supreme Court recognizes that corporate

1 executives, who can be common to parents and subsidiaries,  
2 act in the interest of the entity in which they are acting.  
3 They can wear different hats, and they -- they take off one  
4 hat and put on another. It's a concept that's recognized,  
5 the Supreme Court in the Bestfoods case. I think we cited  
6 it to your Honor. But there are many cases that do that.  
7 So you're going to have to determine. That's not a waiver  
8 of privilege because the same individual is also CEO of the  
9 bank because he was CEO of the holding company.

10 THE COURT: Uh-huh.

11 MR. SACKS: The matter on which he was receiving  
12 legal advice related to a holding company matter. He could  
13 have received legal advice relating to a SVB securities  
14 matter too at that point in time. That would be a privilege  
15 that would be -- would belong, under those circumstances, to  
16 the securities.

17 THE COURT: And what about a situation where there  
18 was someone who was not an executive of both companies, but  
19 was merely an employee of SVB --

20 MR. SACKS: It would --

21 THE COURT: -- party to the same communications?

22 MR. SACKS: It would depend, because, again, there  
23 were intercompany agreements that gave SVB employees access  
24 to things pursuant to a contract by which they performed  
25 services for the holding company.

1 THE COURT: So then I would have to assess whether  
2 that access was not just to do the services what -- but was  
3 further to the interest --

4 MR. SACKS: Standard privilege.

5 THE COURT: Okay.

6 MR. SACKS: Standard privilege analysis --

7 THE COURT: All right.

8 MR. SACKS: -- which is why -- but, your Honor --

9 THE COURT: Yeah.

10 MR. SACKS: -- there may be -- the documents --  
11 when we get through these 300, we may be talking about a de  
12 minimis number of documents here.

13 THE COURT: Great. That would be awesome.

14 MR. SACKS: And that's why --

15 THE COURT: And when will you get through the 300  
16 that's currently --

17 MR. SACKS: Well, they're still going through --  
18 it's 300,000.

19 THE COURT: Three hundred thousand.

20 MR. SACKS: If they would give us privilege -- if  
21 they would give us search terms so we could prioritize it,  
22 that would assist us in getting through it much, much  
23 faster.

24 THE COURT: But you've been going at this for a  
25 while. So what's your pace? So given what you know about

1 the 300,000, how long will it take to get through the review  
2 on this?

3 MR. SACKS: That's beyond my paygrade.

4 THE COURT: All right.

5 MR. SACKS: Ms. McGimsey is going to have to  
6 answer that.

7 THE COURT: I'm happy to hear from Ms. McGimsey.

8 MS. MCGIMSEY: I don't know that I could answer  
9 that question, your Honor. I think it depends on what the  
10 scope of relevant information is -- information that's  
11 relevant to this case, because we all know, and I think  
12 everyone would agree, that it's not 300,000. I think it's  
13 probably closer to -- if you ran search terms, closer to  
14 10,000, in which case we could get through those in probably  
15 a month's --

16 MR. SACKS: A month.

17 MS. MCGIMSEY: A month's time --

18 THE COURT: Okay.

19 MS. MCGIMSEY: -- right?

20 THE COURT: So you have already reviewed, I don't  
21 know, 20-something million, and it took you a year?

22 MR. SACKS: But we didn't review the -- those were  
23 not all reviewed.

24 THE COURT: Okay.

25 MR. SACKS: They involved people. They were given



1 pursuant to a callback arrangement because they didn't  
2 involve -- the ones that are left are the directors and the  
3 senior officers --

4 THE COURT: Okay.

5 MR. SACKS: -- and the internal lawyers.

6 THE COURT: It's custodian specific, the ones that  
7 are -- okay -- the ones that everyone would most like to  
8 see.

9 MR. SACKS: And I --

10 THE COURT: Okay. So I don't want us to put our  
11 heads in the sand. You all have been litigating this case  
12 vociferously for a long time, both here and other places.  
13 Not just this case, but other related cases. Everybody  
14 knows what is relevant to claim and an anticipated defense  
15 or counterclaim. I'm confident. I don't know. But you all  
16 do. There should be no reason why you all can't come up  
17 with a way to facilitate the privilege review so that you're  
18 focusing on, as Ms. McGimsey says, the most relevant  
19 documents. I don't think there's any reason to insist upon  
20 a discovery request in order for that happen -- to happen,  
21 but there needs to be some articulation and a conference  
22 between the parties about what that is. And I would suggest  
23 proposal search terms as a good way to get through ESI. If  
24 the e-mails or whatever they are are in an environment, I  
25 hope they are, where search terms can be implied, because

1 you're suggesting search terms, I would expect that would be  
2 a really efficient way. And there's -- you know, I stopped  
3 practicing before all the fancy tech happened, in terms of  
4 using, you know, predictive analytics to figure out what --  
5 how to prioritize things. But you can do these things now  
6 really efficiently. So I know I cut you off, Mr. --

7 MR. SACKS: -- Sacks.

8 THE COURT: -- Mr. Sacks, before you were done  
9 explaining to me all the ways you thought this could work.  
10 If there are more, I would like to hear from you. But I'm  
11 going to require the parties to do something. And if the  
12 FDIC wants to dispute that it's only 300,000, I'll hear  
13 about that. But if it's only 300,000. And that is a small  
14 pile in the scope of things. That is a small pile. And you  
15 all can get through that, and you can do it efficiently.

16 So please continue, Mr. Sacks.

17 MR. SACKS: No, I think the two alternative ways  
18 to address that issue are either through formal discovery  
19 request to which we respond, or we -- if they give us some  
20 search terms, we'll run the search terms, prioritize those  
21 documents, and get back to them quickly on them --

22 THE COURT: Okay.

23 MR. SACKS: -- on that remaining group of  
24 documents.

25 THE COURT: And then what? So then there's, let's

1 say, 10,000, for example, that you are going to assert your  
2 privilege claim. You're going to need to do something so  
3 that I can test those claims.

4 MR. SACKS: A hundred-percent agree, your Honor.  
5 When --

6 THE COURT: Privilege log, is that --

7 MR. SACKS: -- assuming that -- I don't know.  
8 We're never going to have 10,000 --

9 THE COURT: Okay. Whatever it is.

10 MR. SACKS: -- documents that we're going to --

11 THE COURT: Maybe 10,000 you need to review.  
12 Okay.

13 So whatever it is that you're going to have that you're  
14 going to assert this privilege claim over, you're going to  
15 need to do a log, right?

16 MR. SACKS: Assuming they're on documents relevant  
17 to this case, yes.

18 THE COURT: Well, we're going to -- we're going to  
19 have -- what I'm shooting for is a process that I'm going to  
20 make you all do, may be a little bit unusual because this is  
21 a somewhat unusual circumstance, at least in my experience.  
22 So -- but that -- I think this is a -- this is a plan. This  
23 has a structure. Anything else you would like to say? I'm  
24 looking for a practical solution, because, frankly, that's  
25 what Judge Freeman expects here is that we have a practical

1 solution to get the matters reviewed. So if there is a  
2 dispute about privilege, I'm actually in a position to  
3 resolve it because I'm not in a position to resolve it right  
4 now, unfortunately.

5 MR. SACKS: Okay.

6 THE COURT: I will also say to both parties that  
7 often, privilege disputes, especially ones that require  
8 evidentiary support in order to make or rebut a claim of  
9 privilege or to assert waiver, my expedited procedure is  
10 often insufficient. And so I do allow people to brief those  
11 matters with regularly noticed motions. But then I do  
12 expect you to do what you need to do. I will expect the  
13 supporting declaration, and I will expect the briefing on  
14 the applicable law, that kind of thing. I mean, it won't  
15 just be a -- you know, 1500 words, right? So that's an  
16 option we can discuss. But let me just close out --

17 MR. SACKS: Your Honor --

18 THE COURT: -- this argument by inviting, yeah,  
19 Mr. Sacks to say anything else.

20 MR. SACKS: No, I don't -- I understand what  
21 you're saying, and, you know, I understand that if we want  
22 to withhold documents in this case that are properly subject  
23 to discovery in this case, we have to support it with  
24 appropriate privilege log.

25 THE COURT: Uh-huh.

1 MR. SACKS: I mean, there's no dispute that we  
2 haven't gotten those discovery requests --

3 THE COURT: Okay.

4 MR. SACKS: -- and review at this point. So  
5 that's part of the reason this is premature in addition to  
6 being overbroad. But we understand the requirements to  
7 establish a privilege.

8 THE COURT: Uh-huh.

9 MR. SACKS: We (audio glitch) here for a long  
10 time.

11 THE COURT: Yeah. But how long do you think it  
12 would take to do a privilege log? I guess you don't know  
13 how many there will be, but, you know, let's say --

14 MR. SACKS: I have no idea how long, how many  
15 documents it's going to be dependent on, how many get spit  
16 out. And the answer is that most privilege logs now are  
17 pre-populated in part by the --

18 THE COURT: Yeah, your fancy software. Okay.

19 MR. SACKS: -- the software. And so it's going to  
20 be entirely dependent upon what gets spit out and a second-  
21 level review by people who are going to really determine  
22 what to withhold or not withhold. I mean --

23 THE COURT: Do you have an ESI order or any order  
24 that governs how you're going to handle -- I should have  
25 looked, but I did not. But do you have something that's

1 already negotiated and entered?

2 MR. SACKS: I guess it's being negotiated.

3 Do we have it (indiscernible)?

4 THE COURT: Oh, it's not submitted to me yet?  
5 Okay.

6 MR. SACKS: Oh, it's in -- we have one in the  
7 related C case. So I assume this one is going to bear a  
8 strong resemblance to it.

9 THE COURT: Okay.

10 MR. SACKS: We suggest that we just use the same  
11 one. They wanted to --

12 THE COURT: Okay.

13 MR. SACKS: -- change it a little bit.

14 THE COURT: Fine. We shouldn't delay on that so  
15 that there's no hold up. Okay. All right.

16 MR. SACKS: It's not going to be a long --

17 THE COURT: Yeah.

18 MR. SACKS: -- a long time coming.

19 THE COURT: Great. Okay.

20 Anything else from the holding company before I turn  
21 back to the FDIC?

22 MR. SACKS: I don't think so, your Honor.

23 THE COURT: Okay. Back to you.

24 MR. SORENSON: Thank you, your Honor.

25 Yeah. I mean, what he -- what my colleague just said

1 is kind of breaking news to me. I did -- the last meet and  
2 confer that I was on with my colleagues, they told me four,  
3 500,000 privileged documents. So if they're now telling me  
4 there aren't four, 500,000, that's great. I'm happy about  
5 that.

6 THE COURT: Well, Mr. Laffey, is this your part of  
7 the show? Is it 300,000 that are to be reviewed and nothing  
8 else has been withheld as privilege?

9 MR. LAFFEY: I think what might be helpful, your  
10 Honor, is for them to give us the doc ID numbers of what  
11 they think is the final realm of documents that they have to  
12 review for potential privilege, because in addition to the  
13 three, 400 they've mentioned today, the last meet and  
14 confer, they said there was approximately one million Teams  
15 chat documents that they also were insisting if we review,  
16 we could be disqualified from reviewing.

17 So my understanding was it wasn't just three, 400,000.  
18 If that's the case, they should identify the doc ID numbers  
19 and say we're free to review the rest of the realm of the  
20 universe. And I think that since they're asserting this  
21 privilege over documents that we've had, even pre-lawsuit,  
22 pre-receivership, they need to hurry up and assert the  
23 privilege and give us the log very quickly. They've had 18  
24 months to do that, and they haven't, your Honor.

25 THE COURT: Okay. All right.

1           So here's what I'm thinking. There does need to be,  
2 and maybe it can't be done here, but I hope it can, some  
3 clarity about what can be reviewed and what remains to be  
4 considered before being reviewed. So whatever it is --

5           Ms. McGimsey, did you want to address that point?

6           MS. MCGIMSEY: Yes. They've been -- as we have  
7 de-designated documents -- every time that our team  
8 de-designates documents, they send the FDICR's counsel -- I  
9 think they're dealing principally with the counsel from the  
10 clean team -- a list of document IDs that can be released.

11           THE COURT: Okay.

12           MS. MCGIMSEY: So the FDICR actually has all of  
13 those doc IDs, but we're happy to put those together again  
14 so that Counsel here can have a copy of that as well.

15           THE COURT: What I would really like -- and tell  
16 me if this is unduly burdensome, because I'm not about  
17 creating more burden, I'm just looking for clarity --  
18 document IDs that can be reviewed, document IDs that can't  
19 because they're still under consideration. And you say they  
20 know who the custodians are because you've given them a  
21 list. Just tell them who the custodians are for the ones  
22 that they can't look at.

23           If you do that and it's only 300,000, then I will order  
24 something else to happen. And that's -- I'm going to get  
25 back to the FDIC about the -- what the something else is.



1 But, Ms. McGimsey, is that something that you can do?

2 MS. MCGIMSEY: Yes. That's information that we've  
3 already provided them, so it's very easy for us to put it  
4 together again.

5 THE COURT: Excellent.

6 MS. MCGIMSEY: I do, just for a moment, want to  
7 address the issue with the Teams chats. There are a large  
8 number of Teams chats that nobody has -- I shouldn't say  
9 nobody has reviewed. The FDICR actually has access to a  
10 very significant number of those chats that have been put  
11 into production form, rolled up into transcripts for  
12 purposes of certain regulatory productions that have been  
13 made.

14 THE COURT: Uh-huh.

15 MS. MCGIMSEY: For purposes of this sort of  
16 separate document dispute, we were provided with a  
17 significant number of messages, but they were not collected  
18 in a manner that enables you to review them and search them  
19 for privilege. Our team -- our technical team has been  
20 meeting and conferring with the FDICR's technical team. I  
21 think the last they had a conversation was on August 30th,  
22 and the FDICR's technical team was supposed to come back  
23 with further information so that those could be processed in  
24 a way that they could be reviewed. But we committed during  
25 our call of lead counsel that we would be able to release

1 those very quickly, because those chats, in large part, have  
2 already been reviewed for purposes of these other regulatory  
3 productions, and the number of documents being withheld for  
4 privilege is very small. And we -- I can't tell you how  
5 many of those would be withheld for a holdco only privilege.

6 THE COURT: Uh-huh.

7 MS. MCGIMSEY: But we have a technical issue,  
8 which is that in order to look at a chat message and assert  
9 privilege -- you can look at individual messages. They need  
10 to be processed in a way so you can look at a conversation.

11 THE COURT: Uh-huh.

12 MS. MCGIMSEY: And we don't have the tools from  
13 the FDICR yet to be able to do that.

14 THE COURT: But you're expecting to get those?

15 MS. MCGIMSEY: We hope so.

16 THE COURT: Okay.

17 MS. MCGIMSEY: And once we get those, we can  
18 commit to a date certain and a very quick one --

19 THE COURT: Okay.

20 MS. MCGIMSEY: -- by which we'll be able to  
21 release messages and then tee up any disputes, if there are  
22 any, over anything that we would assert a holdco only  
23 privilege.

24 THE COURT: And these Team chats currently, I  
25 understand, don't have doc IDs.

1 MS. MCGIMSEY: I don't believe that they've been  
2 provided to us in a way that we could roll them up and then  
3 just give them back a document ID that would allow them to  
4 identify what is privileged and what's not.

5 THE COURT: Okay.

6 MS. MCGIMSEY: What I'm told is there's an  
7 identifier that links them together that we need in order to  
8 put them in a conversation, so you can see the whole --

9 THE COURT: Right.

10 MS. MCGIMSEY: -- conversation to assert  
11 privilege, and we don't have that identifier.

12 THE COURT: Right. But just -- this is a -- just  
13 a really just basic question, which is, when we're talking  
14 about doc IDs and how many doc IDs, these Team chats are not  
15 part of that group?

16 MS. MCGIMSEY: They are not.

17 THE COURT: Okay. Just clear -- okay. But there  
18 is a path forward to get them reviewed, and you will be  
19 prepared to provide a date certain once you have the  
20 transcripts or the linking information?

21 MS. MCGIMSEY: Correct. Once we have the linking  
22 information, our team can put together the documents in  
23 transcripts, which will actually, your Honor, facilitate the  
24 FDICR's review for purposes of this case and other cases --

25 THE COURT: Okay.

1 MS. MCGIMSEY: -- because they're not really  
2 usable to anybody until they're put into transcript form.

3 THE COURT: Okay.

4 MS. MCGIMSEY: So as soon as we have that  
5 technical information from the FDICR's technical team,  
6 assuming that they have it, because they have to be  
7 collected in a certain way, then we'll be able to  
8 expeditiously review. And, again, we can commit to a date  
9 certain on a very quick time line for those chats.

10 THE COURT: Okay.

11 So, Mr. Laffey, is that making sense to you?

12 MR. LAFFEY: I mean, obviously, we continue to  
13 have an issue with us having these records for a long time,  
14 including pre-failure, them claiming there's some privilege  
15 to assert, and now we have to wait for them to make requests  
16 for more technical information so they can review and find  
17 out if they believe there's a privilege, and then we have to  
18 go through more delay today.

19 THE COURT: Okay. Let me ask a better question.  
20 Do you -- does it make sense to you that once -- that  
21 there's linking information that the FDICR has that it can  
22 provide to the holding company so that they can do the  
23 review that they want to review -- what -- that they want to  
24 do and then can give you a date certain. Do you have that  
25 technical information, and when can it be provided?

1 MR. LAFFEY: I would need -- I would need more  
2 specifics of what exactly they need from the FDIC, and  
3 we're, of course, happy to inquire as to whether that can  
4 be --

5 THE COURT: Okay.

6 MR. LAFFEY: -- quickly provided. And then we  
7 would hope that they will expedite their review and logging  
8 on their end, because, again, this has been going on --

9 THE COURT: Yes.

10 MR. LAFFEY: -- for 18 months.

11 THE COURT: I understand. And you're here today,  
12 and we're trying to figure it out. Okay.

13 MR. LAFFEY: Thank you, your Honor.

14 THE COURT: So Team chats is a sort of separate  
15 bucket. But as to everything else, we're going to get  
16 clarity on how much remains to be reviewed, and then the  
17 next step.

18 So is there -- so we need to get to some sort of  
19 definition of the -- descriptive definition of the relevant  
20 universe. Their claims, your defenses, and/or counterclaims  
21 that you hope to assert, you know, so what does the FDICR  
22 think is the best way to get that out there?

23 MR. SORENSON: Well, your Honor, earlier, you were  
24 talking about is there a way we can narrow it. And I think  
25 there is a -- actually very narrow dispute that currently is

1 ripe and that you could decide with just a little bit of  
2 evidence and briefing. And that is that -- as I understand  
3 the holding company's position is, their position is that  
4 when lawyers went to a joint board meeting of the board and  
5 the holding company and gave advice, that advice was only to  
6 the holding company and "you have no right to know what that  
7 advice is."

8 And so we take the opposite view, which is you --  
9 lawyers, inside lawyers, outside lawyers, you came to a  
10 joint board meeting giving advice to the board of the bank  
11 and including advice about the corporate governance of the  
12 bank. So we would say that we are entitled to any  
13 communication or -- relating to corporate governance that  
14 was provided at a joint board meeting. That's a very --

15 THE COURT: You already have the board meeting  
16 minutes?

17 MR. SORENSON: Excuse me?

18 THE COURT: You already have the board meeting  
19 minutes?

20 MR. SORENSON: We do. We do.

21 THE COURT: So have they withheld the  
22 communications that you're describing?

23 MR. SORENSON: Well, they -- board minutes are  
24 very summary -- in a very summary fashion.

25 THE COURT: So have they withheld the

1 communications about that that you're describing?

2 MR. SORENSON: We believe so. And I'm more  
3 thinking forward to when we go to a deposition and we go to  
4 ask a question about, "Well, what was discussed? What did  
5 Sullivan and Cromwell suggest that you do in terms of  
6 corporate governance?" there's going to be an objection  
7 because they're going to say privilege.

8 THE COURT: Uh-huh.

9 MR. SORENSON: But we just don't know what  
10 documents there are. We see small -- we see references to  
11 someone from -- outside counsel from Sullivan and Cromwell  
12 doing each year an evaluation of each bank board member --

13 THE COURT: Right.

14 MR. SORENSON: -- and making recommendations.

15 THE COURT: Okay.

16 MR. SORENSON: And that's a very specific thing  
17 that we need for our claim, and we believe we could brief  
18 and submit evidence that --

19 THE COURT: Okay. So I -- that's noted. But I  
20 just got done talking with the holding company, and they say  
21 that, so far, they have not withheld anything on privilege  
22 grounds. They're just still reviewing the 300,000  
23 documents.

24 So if that's a true statement, my goal is to get that  
25 review completed so that we know exactly what's being

1 withheld. Maybe they won't withhold the things that you're  
2 asking for once they complete their review, and I'm inviting  
3 you to help them prioritize their review. So if there is a  
4 custodian's e-mail or there's a subject matter or there are  
5 search terms, I will make them do that first and produce a  
6 privilege log on a rolling basis. But it -- what's the  
7 "it"? We need to define the universe of relevant stuff  
8 first? How can we best do that?

9 MR. SORENSON: Your Honor, I guess I would have to  
10 -- because I'm just learning today that they claim they  
11 haven't held anything back. So if it's true that we have  
12 access to all the e-mails of the in-house counsel, general  
13 counsels, and -- that really does change things. But that  
14 was not my understanding.

15 THE COURT: Well --

16 MR. SORENSON: So I think we need to meet and  
17 confer.

18 THE COURT: Let me be clear.

19 MR. SORENSON: Yes.

20 THE COURT: It's not that they haven't held  
21 anything back. They're currently holding 300,000-something  
22 documents because they haven't finished reviewing them. But  
23 of the material they've reviewed, they have not yet asserted  
24 a claim of privilege.

25 Did I get that right, holding company?



1 MR. SACKS: Correct.

2 THE COURT: So everything else has been provided  
3 to you free of any privilege, or maybe, you know, it's a  
4 joint privilege so you have access to it. I don't know what  
5 the details are.

6 MR. SACKS: Yeah, some of them would be joint  
7 privilege, your Honor, but --

8 THE COURT: So not to be disclosed publicly to  
9 outside of the privilege holders, and I don't understand  
10 that anyone has any intention of doing that right now. That  
11 would be a different issue.

12 So it seems to me that the place where we should put  
13 our effort is trying to focus on the things that you really  
14 need and want. And you've described one category of thing.  
15 I don't know if that can be defined by custodian or subject  
16 matter or terms, but I really would like a proposal from you  
17 all.

18 I don't feel compelled to insist that you serve a  
19 document request for them. But if there's an interrogatory  
20 that invites you to describe what it is that you're after,  
21 either by articulating your anticipated defenses or  
22 counterclaims, you could do it that way. You could rely on  
23 the statement of decision that has been stricken for the  
24 purposes for which you wanted to file it. I understand.  
25 But maybe it's useful for discovery in defining the

1 boundaries. And then there's no reason why you can't engage  
2 in a search term exercise, I don't think, "For this  
3 custodian, search these files using these terms, and then  
4 prioritize your review on everything that hits." This is,  
5 like, normal ESI, you know, techniques. Why not use those  
6 to get what you want as soon as possible?

7 MR. SORENSON: Well, I mean, your Honor,  
8 practically, we already have the documents, so it's just a  
9 question -- but still --

10 THE COURT: Yeah.

11 MR. SORENSON: But I guess if they're going to  
12 tell us that at a date certain they're going to give us a  
13 privilege log with the only thing they're claiming  
14 privilege, then if we could -- if that date is soon enough,  
15 then that is a workable solution.

16 THE COURT: That's what I'm hoping.

17 MR. SORENSON: Okay. Yeah.

18 THE COURT: That's what I'm hoping. So we can  
19 quick -- because right now, I don't have a dispute that I  
20 can decide. It's not presented to me in a -- sufficiently  
21 concrete way. But you can't get to the privilege log on  
22 300,000 documents quickly, necessarily. So that's why I'm  
23 suggesting, is there a way to ask for what you want in a way  
24 that will allow them to prioritize their review?

25 MR. SACKS: Search terms, your Honor.

1 THE COURT: Search terms, yes.

2 MR. SACKS: Let them give us search terms, and we  
3 will prioritize those.

4 THE COURT: So maybe they don't even have to  
5 articulate their theories. They can just say, "Search on  
6 these terms." And as long as they're not  
7 ridiculous --

8 MR. SACKS: Yeah, I mean, they -- yeah, I mean --

9 THE COURT: Here's the problem --

10 MR. SACKS: -- the search terms have to be  
11 reasonable, but I don't know -- I don't understand why they  
12 won't identify their theory, so we at least have the right -  
13 - I mean, the normal course --

14 THE COURT: Here's a practical problem.

15 MR. SACKS: Yeah.

16 THE COURT: Sorry to interrupt, but we're getting  
17 -- we --

18 MR. SACKS: Yeah.

19 THE COURT: -- you all have been here a while. If  
20 you come to me because you can't agree on the search terms  
21 to apply, I'm going to say, "What is this relevant to?"  
22 See, if -- somebody is going to have to tell me why it  
23 matters, right? So why it matters to a claim or an  
24 anticipated defense or a counterclaim. So I -- you know, I  
25 am -- I'm not trying to upset the apple cart in terms of the

1 orderly process on the pleadings, but I am trying to solve  
2 this problem, and I think I could use that help to solve the  
3 problem is to have an articulation. I tried to glean it  
4 from the bankruptcy order that we retrieved, the bankruptcy  
5 order on this offset issue that got issued and, you know,  
6 other things in the case. But I'm not going to know the  
7 case well enough to do that justice, so you're going to need  
8 to tell me. So why not tell them and say, "These are the  
9 search terms we need applied to these custodians." And if  
10 you know the custodians, you can be very effective in  
11 prioritizing what you need. And maybe there's a whole pile  
12 of things that don't matter and they don't need to review.  
13 And then we can get to this privilege -- you know, resolve  
14 the privilege dispute more efficiently.

15 MR. SACKS: Yes, that makes sense to us, your  
16 Honor.

17 THE COURT: Okay. Just a moment. Let me get --  
18 let me get Mr. Sorensen's reaction first.

19 MR. SORENSON: Yes, your Honor. I think that is a  
20 way forward. And there's no mystery. We -- there were in  
21 the initial disclosures what the affirmative defenses are --

22 THE COURT: Okay.

23 MR. SORENSON: -- so -- and --

24 THE COURT: So it shouldn't be hard --

25 MR. SORENSON: No, it shouldn't.

1 THE COURT: -- to sort say, "These and/or these,  
2 but not this."

3 MR. SORENSON: We could come up with --

4 THE COURT: Okay.

5 MR. SORENSON: -- some search terms. And if we  
6 really are down to 300,000 documents --

7 THE COURT: Yeah.

8 MR. SORENSON: -- and we apply search terms and we  
9 can get to a privilege log quickly, yes --

10 THE COURT: Yes.

11 MR. SORENSON: -- that's perfectly fine with the  
12 FDIC.

13 THE COURT: Okay. Well, the last 45 minutes has  
14 not been a waste of time. You've made some progress.

15 Okay. So my plan is to issue an order telling you what  
16 to do in terms of, like, clarifying the state of play. And  
17 then I want to have a process by which you all implement  
18 this search term effort, how -- and report back to me, so I  
19 can kind of keep track of what's going on.

20 How long do you need to make a proposal on the FDIC  
21 Receiver side and confer about it? Since you want to move  
22 fast, how long do you need to make a proposal about search  
23 terms and custodians and what needs to be searched for?

24 MR. SORENSON: By Friday.

25 THE COURT: By Friday. Okay.

1 And then how long would you need to react on the  
2 holding company side?

3 MR. SACKS: I think we would have to get a count  
4 as to how many documents that pulls in off the 300,000, and  
5 then have a meet and confer, presumably at the end of the  
6 following week.

7 THE COURT: Okay. So let me look at the calendar  
8 here. Can you go -- can you all jointly report back to the  
9 Court on September 30th? That's a Monday. So that's a  
10 little less than two weeks Or do you need maybe October  
11 1st? Do you need two weeks to sort of do your respective  
12 investigations and report back? And I just need to know,  
13 you know, we -- here's a -- here's an approach we have.  
14 We've agreed or we disagree. This is my proposal. This is  
15 my proposal. Competing -- I don't want massive briefing. I  
16 want brief proposal about how to resolve any dispute that  
17 you have. And I'll outline for you what -- a little more  
18 clearly what the direction is. But that's what I -- I'm  
19 trying to help you all move it along.

20 So do you think reporting back in two weeks is doable?

21 MR. SORENSON: Yes.

22 MR. SACKS: Yes.

23 THE COURT: Okay. And if you need more time  
24 because you're having a productive conversation, just do a  
25 stipulation saying, "We're going to report back, you know,

1 in, you know, 20 days or so," whatever it is, okay? Just  
2 let me know. But I'm -- I want to make sure this gets  
3 moving. Okay. So October 1st.

4 All right. And that's not to say that there may not be  
5 some discreet disputes that you could already raise with me,  
6 but I am hopeful that because everybody knows the law that  
7 there will be fewer disagreements than you might fear once  
8 we kind of get down to it. So that's what I'm hoping. So I  
9 would prefer to have one -- if I'm going to have briefing on  
10 something, just one event, after you've done the search and  
11 review and there's a privilege log generated, okay? That's  
12 my preference. But that's a little bit farther afield.  
13 Okay. Anything else?

14 MR. SACKS: One issue, your Honor.

15 THE COURT: Sure.

16 MR. SACKS: Mr. Sorenson says we all know what  
17 their setoff claims are going to be. That's not the case.  
18 We wouldn't --

19 THE COURT: Maybe I said that. I don't know --

20 MR. SACKS: No, he just said it a minute ago.

21 THE COURT: Okay.

22 MR. SACKS: And I -- we wouldn't have served the  
23 interrogatory we did that they wouldn't answer if we did  
24 know that, because the thing -- the document that got  
25 stricken said, "Here are specific claims and any other claim

1 we might decide to think of under any circumstances, et  
2 cetera." If the scope of what we're dealing with are the  
3 items that are specifically spelled out in that document  
4 that was stricken, we can live with that.

5 THE COURT: Okay.

6 MR. SACKS: But if there are other things, they  
7 need to identify them for us --

8 THE COURT: Yeah.

9 MR. SACKS: -- so we can determine some sense of  
10 relevance.

11 THE COURT: Here's the problem, they may not know  
12 what they don't know.

13 MR. SACKS: Oh.

14 THE COURT: So they may not know what it is that  
15 is relevant to the case because they haven't been able to  
16 look at all the documents that they think they ought to be  
17 able to look at.

18 MR. SACKS: They know because they have all the  
19 board minutes.

20 THE COURT: Okay.

21 MR. SACKS: And so topically, they know the answer  
22 to that.

23 THE COURT: I'm not going to get into that  
24 dispute. I'm going to be very -- how shall I put it -- very  
25 solicitous of search terms that make sense. I'm just going



1 to put it that way.

2 MR. SACKS: Well --

3 THE COURT: Solicitous of search terms that make  
4 some sense --

5 MR. SACKS: Well, that's --

6 THE COURT: -- without requiring precise  
7 definition of an affirmative defense or a counterclaim.

8 MR. SACKS: I understand that. So the way those  
9 things are identified are not with specificity --

10 THE COURT: Okay.

11 MR. SACKS: -- in the sense of evidentiary. We  
12 have claims based upon the mismanagement. We have claims  
13 based upon the transfer of warrants to the holding company.  
14 We have claims based upon the payment of the dividend.  
15 They're topical in that sense.

16 THE COURT: Uh-huh, great.

17 MR. SACKS: So we know what they are.

18 THE COURT: Great.

19 MR. SACKS: If there are any other topics that are  
20 not --

21 THE COURT: Okay.

22 MR. SACKS: -- topically identified, your Honor  
23 couldn't determine relevance if it's --

24 THE COURT: I would expect you to confer about  
25 that. And, you know, you may not know all of your defenses

1 and counterclaims, fine, and whether you're allowed to amend  
2 or -- if you haven't even asserted them yet. So we're --  
3 you're not even at the point of amendment. But that's not  
4 my problem right now. So I'm just -- I'm really just trying  
5 to get through the privilege pile --

6 MR. SACKS: Yeah --

7 THE COURT: -- my potentially privilege pile.

8 MR. SACKS: -- their setoff defense is not  
9 counterclaim --

10 THE COURT: Whatever they are.

11 MR. SACKS: They've been very clear they're not  
12 asserting counterclaims --

13 THE COURT: Okay.

14 MR. SACKS: -- that they're setoff defense.

15 THE COURT: Very well. Somebody said  
16 counterclaim, and I ran with it. But if it's appropriately  
17 described as a setoff defense -- I saw in the bankruptcy  
18 there was a major distinction on that point, so -- the  
19 bankruptcy order. So I don't mean to put words in anyone's  
20 mouth here. Okay.

21 MR. SACKS: Very well.

22 THE COURT: Anything else for today --

23 MR. SACKS: No.

24 THE COURT: -- from either side?

25 MR. SORENSON: No, thank you.

1 THE COURT: Okay. And I will issue an order just  
2 kind of giving you direction. But I hope you all don't wait  
3 for that order, and please do start providing the  
4 information that you can to clarify where things stand,  
5 okay?

6 Thank you all very much for your time. I appreciate  
7 it.

8 MR. SORENSON: Thank you.

9 MR. SACKS: Thank you.

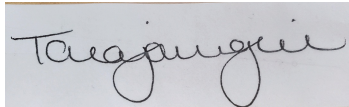
10 THE CLERK: The court is concluded.

11 (Proceedings adjourned at 11:49 a.m.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A handwritten signature in cursive script, appearing to read "Teagunee", is centered within a light gray rectangular box.

Echo Reporting, Inc., Transcriber

Monday, September 23, 2024